Malik Ismathbatcha Malik & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS K-05–227–08 OF 2011 AND K-05–228–08 OF 2011
BALIA YUSOF, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
25 OCTOBER 2013

Criminal Law — Dangerous Drugs Act 1952 — s 37(da) — Whether presumption of trafficking in ketamine under s 37(da) of the DDA wrongly invoked — Whether error could be condoned under s 60 of the Courts of Judicature Act 1964 — Whether trial judge failed to consider if prosecution had rebutted Alcontara notice given in cautioned statement — Whether accused raised plausible explanation to rebut trafficking charge

The first and second appellants were convicted and sentenced to death under the Dangerous Drugs Act 1952 ('DDA') by the High Court for trafficking in, respectively, 1,389.14g and 663.52g of ketamine at the Passengers' Inspection Special Unit at Kuah Jetty in Langkawi. Customs officers manning the jetty checkpoint found the drugs after they stopped the appellants and checked the boxes they were carrying. Both appellants denied knowledge of the drugs. The first appellant said a person named 'Khan' at Delhi airport paid for all his expenses to deliver three of the boxes to a person at Langkawi airport, but after that person failed to turn up at the airport the first appellant was told to go to the Langkawi jetty. The second appellant said he was also at Delhi airport at the same time when he was asked to help carry a fourth box. The trial judge rejected the defences as an afterthought. In their instant appeal against conviction and sentence, the appellants, inter alia, said: (i) the trial judge was wrong to have invoked the presumption of trafficking under s 37(da) of the DDA as that section did not apply to ketamine; and (ii) the trial judge failed to consider the second appellant's cautioned statement where he had, inter alia, given police the telephone number of the person who had asked him to carry one of the boxes and requested them to call that number to know that his story was true.

Held, dismissing the first appellant's appeal and allowing the second appellant's appeal:

(1) Even though s 37(da) was not applicable, it was not disputed that ketamine fell within the definition of dangerous drugs in Schedule 1 of the DDA. On the factual matrix of the case, the trial judge's error could be condoned under s 60 of the Courts of Judicature Act 1964 because: (i) the appellants were found in actual possession of the drugs; (ii) the drugs were brought in from overseas and attracted s 2 of the DDA which

defined trafficking and which in turn was sufficient to attract s 39B(1)(a) of the DDA; (iii) the large amount of the ketamine attracted the 'irresistible inference' jurisprudence to say the appellants had knowledge of the drugs; and (iv) s 37(d) of the DDA assisted the prosecution to strengthen the issue relating to knowledge (see para 15).

(2) The prosecution had established a prima facie case of trafficking and the defence of the appellants was rightly called (see para 17).

(3) The second appellant's cautioned statement was exculpatory in nature and stood as *Alcontara* Notice. The moment an accused gave sufficient *Alcontara* Notice, the burden was on the prosecution to rebut the same satisfactorily. The trial judge was required to consider whether the prosecution had rebutted the same; whether the evidence of the accused was a plausible explanation to rebut the charge of trafficking and whether the accused's story if not inherently incredible and when tested against the prosecution's case created a reasonable doubt (see paras 19–20).

(4) In respect of the second appellant there was sufficient evidence to rebut the charge of trafficking. The trial judge's failure to follow *Radh*i's direction made his conviction and sentence unsafe. The record showed the second appellant had left the customs area when he was called to come back. This showed he had no interest in the boxes consistent with his story when tested against the prosecution's case. In addition, the evidence of the first appellant supported the second appellant's story that the three boxes did not belong to him. Despite the evidence to support the second appellant's story as well as the *Alcontara* Notice, the trial judge's finding that the second appellant's defence was a mere denial was perverse. It demonstrated lack of judicial appreciation of the second appellant's defence and, that, was fatal (see paras 21–22).

(5) In respect of the first appellant there was no sufficient evidence to show he had rebutted the charge of trafficking on balance of probabilities (see para 23).

[Bahasa Malaysia summary

Perayu-perayu pertama dan kedua telah disabit dan dihukum mati di bawah Akta Dadah Berbahaya 1952 ('ADB') oleh Mahkamah Tinggi kerana mengedar dadah ketamine, masing-masing, seberat 1,389.14g dan 663.52g di Unit Khas Pemeriksaan Penumpang di Jeti Kuah, Langkawi. Pegawai-pegawai kastam yang bertugas di pusat pemeriksaan jeti telah menjumpai dadah tersebut selepas mereka menahan perayu-perayu dan memeriksa kotak-kotak yang dibawa oleh mereka. Kedua-dua perayu menafikan pengetahuan tentnag dadah tersebut. Peryau pertama menyatakan seorang bernama 'Khan' di lapangan terbang Delhi telah membayar untuk semua perbelanjaannya bagi menghantar tiga kotak tersebut kepada seseorang di lapangan terbang Langkawi, tetapi selepas orang itu gagal untuk hadir di lapangan terbang itu

perayu pertama diberitahu untuk pergi ke jeti Langkawi. Perayu kedua menyatakan dia juga berada di lapangan terbang Delhi pada masa sama apabila dia diminta membantu untuk mengangkat kotak keempat. Hakim perbicaraan menolak pembelaan sebagai suatu yang telah difikirkan kemudian. Dalam rayuan mereka terhadap sabitan dan hukuman, perayu-perayu, antara lain, menyatakan; (i) hakim perbicaraan itu terkhilaf kerana telah menggunakan andaian pengedaran di bawah s 37(da) ADB kerana seksyen tersebut tidak terpakai untuk ketamine; (ii) hakim perbicaraan telah gagal untuk mengambil kira kenyataan beramaran perayu kedua di mana dia telah, antara lain, memberikan kepada polis nombor telefon orang yang telah memintanya untuk menelefon kotak-kotak tersebut dan meminta mereka untuk memanggil nombor itu bagi mengetahui yang ceritanya adalah benar.

Diputuskan, sebulat suara menolak rayuan perayu pertama dan mengetepikan sabitan dan hukuman perayu kedua:

(1) Walaupun s 37(da) tidak terpakai, ia tidak dipertikaikan bahawa ketamine jatuh di bawah definisi dadah berbahaya dalam Jadual 1 kepada ADB. Berdasarkan fakta matriks kes ini, kekhilafan hakim perbicaraan boleh diizinkan di bawah s 60 Akta Mahkamah Kehakiman 1964 kerana: (i) perayu-perayu didapati mempunyai milikan sebenar dadah tersebut; (ii) dadah tersebut telah dibawa masuk daripada luar negara dan s 2 ADB adalah terpakai yang mentafsirkan pengedaran dan adalah mencukupi untuk menggunapakai s 39B(1) ADB; (iii) jumlah besar ketamine menarik jurisprudens 'irresistible inference' untuk mengatakan perayu-perayu mempunyai pengetahuan tentang dadah tersebut; dan (iv) s 37(d) ADB membantu pendakwaan untuk mengukuhkan isu berkaitan dengan pengetahuan (lihat perenggan 15).

(2) Pendakwaan telah membuktikan kes prima facie pengedaran dan pembelaan perayu-perayu telah wajar dipanggil (lihat perenggan 17).

(3) Kenyataan beramaran perayu kedua mempunyai sifat yang boleh membersihkan namanya dan bertindak sebagai Notis *Alcontara*. Apabila tertuduh diberikan Notis *Alcontara* yang mencukupi, beban terletak atas pendakwaan untuk membantah yang sama dengan memuaskan. Hakim perbicaraan dikehendaki mengambil kira sama ada pendakwaan telah mematahkan yang sama; sama ada keterangan tertuduh adalah penjelasan yang munasabah untuk menyangkal pertuduhan pengedaran itu dan sama ada cerita tertuduh jika tidak bersifat luar biasa dan apabila diuji terhadap kes pendakwaan mewujudkan keraguan yang munasabah (lihat perenggan 19–20).

(4) Berkenaan perayu kedua terdapat bukti yang mencukupi untuk menyangkal tuduhan pengedaran. Kegagalan hakim perbicaraan untuk mengikut arahan *Radhi* menjadikan sabitan dan hukumannya tidak selamat. Rekod menunjukkan perayu kedua telah meninggalkan

kawasan kastam apabila dia dipanggil untuk kembali. Ini menunjukkan dia tidak mempunyai kepentingan dalam kotak-kotak tersebut yang konsisten dengan ceritanya apabila diuji terhadap kes pendakwaan. Di samping itu, bukti perayu pertama menyokong cerita perayu kedua itu bahawa tiga kotak itu bukan miliknya. Walaupun bukti untuk menyokong cerita perayu kedua dan juga Notis *Alcontara* itu, penemuan hakim perbicaraan bahawa pembelaan perayu kedua itu adalah penafian semata-mata adalah salah. Ia menunjukkan kurangnya penghargaan kehakiman terhadap pembelaan perayu kedua dan, oleh itu, ia memudaratkan (lihat perenggan 21–22).

(5) Berkenaan perayu pertama tiada keterangan mencukupi untuk menunjukkan dia telah menyangkal tuduhan pengedaran atas imbangan kebarangkalian (lihat perenggan 23).]

Notes

For cases under s 37(da) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 368–384.

Cases referred to

Ahmad Mukammal bin Abdul Wahab & Ors v PP [2014] 1 MLJ 865; [2013] 4 CLJ 949, CA (refd)
Alcontara a/l Ambrose Anthony v PP [1996] 1 MLJ 209, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Lim Toh Sin v PP [1966] 1 MLJ 278, FC (refd)
Md Desa bin Hashim v PP 1995] 3 MLJ 350, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)
Munuswamy Sundar Raj v PP [2013] 5 MLJ 48, CA (refd)
Ong Ah Chuan v PP Koh Chai Heng v PP [1981] 1 MLJ 64, PC (refd)
Phrueksa Taemchim (Thailand) v PP [2013] 6 MLJ 808; [2013] 5 AMR 338, CA (refd)
PP v Abdul Rahim Kalandari Mustan [2008] 6 MLJ 161, FC (distd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Nor Azman bin Abidin (P-05–21–01 of 2012 and P-05–27–02 of 2012) (unreported) (refd)
Pramod Mandal v State of Bihar [2004] 4 LRI 24, SC (refd)
Rozmi bin Yusof v PP [2013] 5 MLJ 66, CA (refd)
Thenegaran a/l Murugan & Anor v PP [2013] 2 MLJ 855; [2013] 5 CLJ 850, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60, 60(1)
Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 39B(1)(a), Schedule 1
Penal Code s 34

Appeal from: Suit Nos 45A–33 of 2009 and 45A–34 of 2009 (High Court, Alor Star)

Ramasamy Amaippan (Lim Ram & Associates) for the first appellant.
Afifuddin bin Ahmad Hafifi (Sallehuddin Saidin & Associates) for the second appellant.
Yusaini Amer bin Abd Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] Both the appellants' appeals are in respect of conviction and sentence for the charge of trafficking which came up for hearing on 21 August 2013 and on the same day upon hearing we dismissed the first appellant's appeal and set aside the conviction and sentence of the second appellant. My learned brothers Balia Yusof bin Haji Wahi JCA and Mohtarudin bin Baki JCA have read the draft judgment and approved the same. This is our judgment.

CHARGE

[2] The first appellant's amended charge reads as follows:

> Bahawa kamu bersama seorang lagi yang bernama Ibramsa Maideen (No. Pasport: B5607667), pada 30 Mei 2009 jam lebih kurang 2.00 petang di Unit Khas Pemeriksaan Penumpang, Jeti Kuah, di dalam daerah Langkawi, dalam negeri Kedah Darul Aman, telah mengedar dadah berbahaya iaitu Ketamine seberat 1389.14 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

The English translation will read as follows:

> That you and another named Ibramsa Maideen (Passport no. B5607667) on 30th May 2009 at about 2.00 pm at the Passengers' Inspection Special Unit, Kuah Jetty, in the district of Langkawi, in the state of Kedah Darul Aman, had trafficked in dangerous drugs Ketamine weighing 1389.14 grams thereby committing an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under section 39B(2) of the same Act read together with section 34 of the Penal Code.

[3] The second appellant's amended charge reads as follows:

> Bahawa kamu bersama seorang lagi yang bernama Malik Ismathbatcha Malik (No Pasport: H2200541), pada 30 Mei 2009 jam lebih kurang 2.00 petang di Unit Khas Pemeriksaan Penumpang, Jeti Kuah, di dalam daerah Langkawi, dalam negeri Kedah Darul Aman, telah mengedar dadah berbahaya iaitu Ketamine seberat 663.52 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah

seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

The English translation will read as follows:

That you and another named Malik Ismathbatcha Malik (Passport no. H2200541) on 30 May 2009 at about 2.00pm at the Passengers' Inspection Special Unit, Kuah Jetty, in the district of Langkawi, in the state of Kedah Darul Aman, had trafficked in dangerous drugs Ketamine weighing 663.52 grams thereby committing an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under section 39B(2) of the same Act read together with section 34 of the Penal Code.

[4] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record. (see *Pramod Mandal v State of Bihar* [2004] 4 LRI 24).

[5] The issues raised in this case is related to whether the learned trial judge has justly and fairly considered the defence case and whether the conviction is safe.

BRIEF FACTS

[6] The appellants were separately charged but jointly tried as the case involved the same transaction and witnesses. The prosecution case can be summarised as follows: (a) PW3 an officer of customs saw both appellants walking towards the customs' inspection area, (b) the first appellant was pushing a trolley stacked with three boxes and a bag, (c) PW3 instructed the first appellant to place the boxes on the scanner machine for inspection, (d) the first appellant called out to the second appellant who had exited the area, (e) the boxes were then scanned and inside the boxes were found bags containing clear crystaline substances (drugs). Both appellants were arrested and the exhibits seized, (f) 1,389.14g were recovered from the first appellant's boxes and 663.52g were recovered from the second appellant's box.

The first appellant's defence

[7] The first appellant denied having knowledge of the contents of the boxes. When the first appellant was at the Delhi Airport, a man named Khan asked the first appellant to send the boxes to someone named Rahman Bhai in Langkawi. Khan also gave the first appellant a letter dated 27 May 2009 from Affern Back Works, a flight ticket from Delhi—Singapore—Langkawi and

RM2,000 for expenses while in Langkawi. At the Langkawi Airport, the first appellant waited for Rahman Bhai who did not show up but instructed the first appellant to go to the Langkawi jetty, where he was then arrested.

The second appellant's defence

[8] The second appellant did not have knowledge of the contents of the box. The second appellant came to Langkawi to search for a job in a restaurant in Langkawi, through a friend named Iqbal. At the Delhi Airport, the second appellant met with the first appellant, who asked the second appellant to bring one of the three luggages he had. The first appellant opened the box and showed empty bags inside the box to the second appellant. Someone at the Delhi Airport who was with the first appellant at the time informed that the boxes were to be handed to one Rahman Bhai, who will fetch the boxes at the Langkawi Airport. When Rahman Bhai did not appear at the Langkawi Airport, the second appellant called and was instructed to leave Langkawi. The second appellant was arrested while he was attempting to board a ferry.

[9] The learned trial judge rejected their defence and held that it was an afterthought. The learned counsel in this appeal complains as follows:

(a) There was a misdirection by the learned trial judge by applying the presumption under s 37(da) of the Dangerous Drugs Act 1952 as the section does not cover ketamine.

(b) The appellants had no knowledge of the drugs as two boxes were under the name of the first appellant and one box was under the name of the second appellant. All boxes were neatly tied and the drugs were carefully concealed inside the base of the bags inside the boxes.

(c) Common intention under s 34 of the Penal Code was not proven.

(d) The cautioned statement ('exh D21') was consistent with the oral evidence of the second appellant when he testified in open court at the hearing.

[10] The learned counsel for the first appellant did not file any submission and the learned counsel for the second appellant had filed a submission and both have agreed that the second appellant's counsel will lead. The petition of appeal for both essentially were the same.

Section 37(da) of the Dangerous Drugs Act 1952 and ketamine

[11] It was the contention of the appellants that it was wrong for the learned judge to have relied on s 37(da) to presume that the appellants were trafficking

when ketamine is not one of the prescribed drugs under the said section, and called for the defence. That part of the judgment complained of reads as follows:

> Oleh kerana jumlah dadah adalah banyak, Tertuduh-Tertuduh dianggap mengedar dadah berbahaya tersebut seperti yang diputuskan dalam kes-kes *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 dan *Suzie Adrina* [2006] 3 CLJ 889. Anggapan di bawah seksyen 37(da) ADB 1952 itu gagal disangkal oleh kedua-dua Tertuduh.

[12] The learned counsel complains that there was a grave misdirection on the part of the learned judge which amounts to a non-direction and relies on the case of *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 to seek an acquittal on the ground that a substantial miscarriage has occurred by reason of the mistake, omission or irregularity in the trial and the appellants have lost a chance of acquittal which is open to them, (see *Lim Toh Sin v Public Prosecutor* [1966] 1 MLJ 278; *Md Desa bin Hashim v Public Prosecutor* 1995] 3 MLJ 350).

[13] The learned counsel also reminds us on the authority of the Federal Court decision in *Public Prosecutor v Abdul Rahim Kalandari Mustan* [2008] 6 MLJ 161 and says it will not be appropriate for the Court of Appeal to invoke s 60(1) of the CJA 1964 to condone the miscarriage of justice.

[14] We have gone through the case of *Kalandari Mustan* and the Federal Court was not dealing with similar facts as in this case. In that case the issue was related to double presumption and the Federal Court based on contemporary authorities rightly held that s 60 of the CJA 1964 could not be exercised to cure the defect.

[15] In the instant case even though s 37(da) is not applicable but it is not in dispute that ketamine falls within the definition of dangerous drugs as set out in Schedule 1 of DDA 1952. The issue here is whether s 37(da) as stated by the learned judge is sufficient to entitle the appellants an acquittal. On the factual matrix of the case we are of the considered view that the error can be condoned pursuant to s 60 of the CJA 1964. Our reasons are as follows:

(a) The appellants were found in actual possession of the drugs, and the drugs were brought from overseas to attract s 2 of the DDA 1952 which defines trafficking, which is sufficient to attract s 39B(1)(a) of the DDA 1952.

(b) In addition, the large amount carried by the appellants from one place to another will attract 'irresistible inference' jurisprudence to say they had

knowledge, (see *Ong Ah Chuan v Public Prosecutor Koh Chai Heng v Public Prosecutor* [1981] 1 MLJ 64; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1).

(c) Further, s 37(d) of the DDA 1952 will assist the prosecution to strengthen the issue relating to knowledge.

[16] The Court of Appeal had dealt with the jurisprudence relating to ss 2, 37(d) and 37(da) in great detail in the recent case of *Phrueksa Taemchim (Thailand) v Public Prosecutor* [2013] 6 MLJ 808; [2013] 5 AMR 338, where it was, inter alia, held:

(a) s 37(d) will be applicable to all offences under DDA 1952;

(b) s 37(da) will only apply when there is finding of actual possession, and can sustain a charge of trafficking; and

(c) Actual possession can be established by inference provided the mental state of knowledge can be established from all facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

Hamid Sultan JCA, on ss 37(d) and 37(da) had this to say:

> As we have said earlier s 37(d) or 37(da) comes into force by operation of law with a caveat that s 37(da) cannot be sustained if s 37(d) necessarily have to be used to supplement the ingredient of knowledge, ie rule against double presumption. It does not matter on issues of law what the trial judge says about s 2 or 37(d) or 37(da) if there is overwhelming evidence of trafficking according to law, the appellate court is at liberty to apply s 60 of the Courts of Judicature Act 1964 if the law requires a conviction. The application of s 37(d) or 37(da) only imposes the accused to speak of his innocence to earn a conviction for possession or obtain an acquittal. Nothing more.

[17] It is our considered view on the facts of this case, the prosecution had established a prima facie case of trafficking and defence was rightly called. The only issue for the learned judge to consider at the defence stage is whether the appellants had rebutted the charge of trafficking on the balance of probabilities and on the part of the Court of Appeal to ensure the conviction and sentence against the appellants are safe, (see *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855; [2013] 5 CLJ 850).

Assessment of defence case

[18] The learned counsel for the appellant submitted that the appellant's evidence was exculpatory in nature and the second appellant's evidence was

that he had no knowledge. In essence, the learned counsel complains that the learned trial judge did not consider the caution statement of the second appellant marked as exh D21.

[19] In the instant case both the appellants have given a caution statement. The first appellant's caution statement which was marked as exh D69 (pp 629–631) was a mere denial and does not amount to *Alcontara* Notice. However, the second appellant's caution in exh D21 (pp 612–614 of the appeal record) was exculpatory in nature and stands as *Alcontara* Notice. The relevant part of the statement reads as follows:

> Saya tak tahu bahawa ada dadah dalam beg-beg itu, kotak-kotak itu bukan kepunyaan saya. Masa saya tunggu di lapangan terbang New Delhi kawan saya Ismathbacha Malik (OKT 1) datang dengan seorang lelaki. Lelaki tersebut meminta bantuan saya untuk membawa 3 buah kotak, satu kotak atas nama saya dan dua kotak lagi atas nama Ismathbacha Malik.
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> Apa yang saya beritahu itu adalah benar, lelaki yang mengirim itu ada bagi nombor telefon dan tadi sudah menalipon saya dan kalau pihak tuan menjawabnya tentu dapat menangkap mereka dan membebaskan saya.

[20] It is trite that the moment an accused has given sufficient *Alcontara* Notice the burden is placed on the prosecution to rebut the same satisfactorily and the trial judge is required to consider whether the prosecution has rebutted the same and in addition consider whether the evidence of the accused is a 'plausible explanation' to rebut the charge of trafficking and whether the story of the accused if not inherently incredible and when tested with the prosecution case creates a reasonable doubt in the mind of the appellant as stated in a number of cases in composite, (see *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209; *Munuswamy Sundar Raj v Public Prosecutor* [2013] 5 MLJ 48; *Public Prosecutor v Nor Azman bin Abidin* (P-05–21–01 of 2012 and P-05–27–02 of 2012).

[21] In the instant case it was the first appellant who was seen pushing the boxes and the second appellant has already left the area and he was called to come back. This will show that he had no interest in the boxes consistent with his story when tested with the prosecution case. This part of the evidence has been summarised by the learned deputy public prosecutor and, inter alia, reads as follows:

> Pada 30 Mei 2009, antara jam 12.40 tengahari, ketika Revathi a/p Asogar (SP3), seorang pegawai Kastam berada di kaunter pemeriksaan Jeti Kuah, Langkawi, beliau lihat seorang penumpang lelaki India (Perayu kedua — Ibramsa Maideen) masuk ke kawasan pemeriksaan penumpang dengan sebuah beg galas warna hitam (P17). SP3 telah bertanyakan dalam bahasa Tamil samada dia ada membawa apa-apa. SP3 telah

melakukan pemeriksaan manual keatas beg tersebut dan mendapati di dalamnya terdapat pakaiannya sahaja. SP3 pun melepaskannya ke kawasan balai menunggu feri.

Selepas beberapa minit, SP3 melihat seorang lelaki India (Perayu Pertama — Malik Ismathbatcha)] masuk ke kawasan pemeriksaan penumpang dengan menolak troli. Di atas troli terdapat 3 kotak (P9, P11 dan P13) dan sebuah beg (P15). SP3 pun mengarahkan lelaki tersebut untuk imbas kotak-kotak tersebut dalam bahasa Tamil tetapi dia enggan berbuat demikian dan terus menolak troli dengan laju. Oleh itu SP3 meminta bantuan Encik Lee Kuang Guan (SP5), seorang pegawai Kastam untuk menahan lelaki tersebut.

SP5 telah memanggil lelaki tersebut tetapi dia masih enggan berhenti. SP5 memegang tangan lelaki tersebut dan mengambil 1 kotak dari troli dan meletakkannya atau kaunter pemeriksaan. Selepas itu SP3 melihat lelaki tersebut memanggil seseorang dari arah balai menunggu. Selepas orang itu datang, SP3 mengecam bahawa orang itu ialah penumpang yang beliau periksa sebelum itu.

SP5 ada bertanyakan kepada lelaki pertama tersebut dalam bahasa Inggeris barang tersebut siapa punya. Lelaki tersebut menjawab bahawa barang tersebut mereka yang punya beserta dengan bahasa isyarat.

[22] In addition, the evidence of the first appellant also supports the second appellant's story, that the three boxes did not belong to him. Despite the fact that there is evidence on the face of record to support the second appellant's story as well as the *Alcontara* Notice the learned trial judge's finding that the second appellant's defence was a mere denial must be seen to be perverse and demonstrates lack of judicial appreciation of the second appellant's defence which on the facts of the case is fatal. In addition, the learned trial judge has failed to follow *Radhi*'s direction strictly, (see *Ahmad Mukammal bin Abdul Wahab & Ors v Public Prosecutor* [2014] 1 MLJ 865; [2013] 4 CLJ 949).

[23] In respect of the first appellant we are satisfied there is no sufficient evidence on record to justify that the first appellant has rebutted the charge of trafficking on the balance of probabilities. In respect of the second appellant we are of the considered view that there is sufficient evidence on record to rebut the charge of trafficking and the failure of the learned trial judge to follow *Radhi*'s direction makes the conviction and sentence unsafe, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66).

[24] For reasons stated above, the first appellant's appeal is dismissed and the second appellant's appeal is allowed. The conviction of the second appellant is quashed.

A We hereby order so.

First appellant's appeal dismissed and second appellant's appeal allowed.

B Reported by Ashok Kumar

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